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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS, AND BRIEF IN SUPPORT.

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SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1950

No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION BY CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES, FOR A WRIT OF CERTIORARI TO REVIEW A JUDGMENT OF THE UNITED STATES COURT OF CLAIMS ENTERED JUNE 5, 1950, DISMISSING A PETITION FOR A MONEY JUDGMENT AGAINST THE UNITED STATES.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Summary of the Matter Involved

The petitioner owns and operates a wholesale and retail dairy business in Lexington, Kentucky. During the period May 15, 1946 through June 30, 1947 he furnished dairy products to the Veterans Administration hospital in that

city under a contract awarded him May 13, 1946. Such contract contained the standard form paragraph:

> "6. Prices bid herein include any Federal Tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change will be charged to the Government and entered on vouchers (or invoices) as separate items."

Prior to being awarded the contract, petitioner was advised by the supply officer of the hospital that the above paragraph would permit a successful bidder to increase and adjust the contract price if the Office of Price Administration (hereinafter referred to as O.P.A.), a federal agency, increased price ceilings on the dairy products to be furnished under the contract. The Chairman of the Board of Awards also advised petitioner that he was of opinion that prices could be so adjusted under the quoted paragraph.

The petitioner performed the contract. Less than a month after he began deliveries, on June 7, 1946, the O.P.A. increased the price ceilings on dairy products for the Lexington, Kentucky area. (O.P.A. supplemental order 164, Fed. Reg. June 11, 1946, p. 6301.) Petitioner's costs of performance were thereby increased. He billed the hospital for those increased costs and received payment. Thereafter the same were deducted from the last monthly payment under the contract.

Plaintiff brought the instant action in the Court of Claims to recover the conceded amount of such increased costs, That Court dismissed the action on the ground that the questioned paragraph did not relate to an adjustment in ceiling prices by the O.P.A. and that petitioner was not entitled to rely upon the expressed opinion to the contrary of the Chairman of the Board of Awards.

A dissenting opinion was filed with which the Chief Judge agreed.

Jurisdictional Statement

Jurisdiction of this Court is based on section 1255 (1) of Title 28, United States Code.

Statute Involved

The only statute involved is the Emergency Price Control Act of 1942, 56 Stat. 23, chapter 26 (50 U. S. C. App. sec. 901 et seq.). The Office of Price Administration issued, pursuant to the authority of that statute, its supplemental order 164, dated June 7, 1946 which is set forth in the Federal Register of June 11, 1946 at page 6301.

Questions Presented

Was supplemental order 164 of the Office of Price Administration (issued pursuant to laws of the United States and increasing the price of dairy products for the Lexington, Kentucky, area) the action of Congress and thereby a definite, fixed and directly applicable charge within the meaning of paragraph 6 of petitioner's contract?

Was petitioner entitled to rely upon assurances, given him prior to award of the contract, by the government supply officer and Chairman of the Board of Awards that paragraph 6 did relate to adjustment by the Office of Price Administration in ceiling prices for such dairy products?

Reasons for Allowance of the Writ

1. The meaning and scope of paragraph 6 in government contracts should be settled definitely to the end that lay bidders in particular may understand it.

2. The extent of the Government's liability under standard form contracts containing this paragraph and likewise the extent to which reliance under the instant facts may be had upon assurances of government officers in the award of contracts, should be determined and settled. The observation of the dissenting judge below (R. 15) is compelling:

> "If that is the law, another uncertainty is added to the status of a contractor with the Government, for which added uncertainty the Government will, of course, pay dearly in the long run in the additions which bidders must make to otherwise fair prices as insurance against unanticipated interpretations of their contracts."

Respectfully submitted,

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SUPREME COURT OF THE UNITED STATES

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No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES,

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THE UNITED STATES,

Respondent.

ON PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF OF PETITIONER IN SUPPORT OF PETITION

Opinion Below

The majority and dissenting opinions of the Court of Claims (R. 7-13, 13-16) are not yet officially reported.

Jurisdiction

The judgment of the Court of Claims was entered June 5, 1950. The jurisdiction of this Court is invoked under Section 1255 (1) of Title 28, United States Code.

Questions Presented

1. Was the order of the Office of Price Administration (issued June 7, 1946, increasing the price of dairy products in the Lexington, Kentucky, area) the action of Congress and thereby a definite, fixed and directly applicable charge "upon the production, manufacture, or sale of the supplies" within the meaning of paragraph 6 of petitioner's contract?

2. Was petitioner entitled to rely upon assurances, given him prior to award of the contract, by the government supply officer and Chairman of the Board of Awards that paragraph 6 did relate to adjustment by the Office of Price Administration in ceiling prices for such dairy products?

Pertinent Statute

The Emergency Price Control Act of January 30, 1942, 56 Stat. 23, Chapter 26 (50 U. S. C. App. sec. 901 et seq.), authorized the stabilization of prices of agricultural commodities and the establishment of maximum prices therefor by regulation or order of the Office of Price Administration. By supplemental order 164, dated June 7, 1946 (Federal Register, June 11, 1946, page 6301) the Office of Price Administration increased the price ceilings on the dairy products covered by petitioner's contract. The text of the Act and of the supplemental order are not deemed necessary to be set forth herein as the authority under the Act and the order are not in dispute (R. 5, 6; Findings 2, 4).

Statement

The essential facts are stated briefly in the Summary of the Matter involved accompanying the petition for the writ. The Court below made detailed special findings of fact (R. 4-7).

Argument

We believe the answers to each of the two questions presented should be in the affirmative. The incisive views in the dissenting opinion seem to us correct and to establish that the majority opinion below is erroneous:

> "Paragraph 6 is not a statute. It is, in any particular case such as this, merely the language which parties have used in making a contract. If it has a plain meaning to some one 'in Washington', it obviously did not have that plain meaning to this plaintiff dairyman in Kentucky, because he inquired what it meant. And it meant plainly to the Government Agent who had been stationed in Kentucky to, *inter alia,* make contracts for the Government, the very opposite of what it was later said to mean 'in Washington'. All of this seems to me to show that it was at least ambiguous enough to mean what the parties agreed that it meant, viz., that if prices were increased by the O.P.A. and the plaintiff paid those increases, its bid prices to the Government would be increased accordingly" (R. 14).

The Comptroller General asserted in his denial of petitioner's claim that a price increase is neither a tax nor a charge (R. 7, Finding 6). But it definitely is an "adjustment charge" or "charge". It stems from, and the basis of the cited O.P.A. order is, the Emergency Price Control Act of 1942, as amended (50 U. S. C. A. App. sec. 901 et seq.)

Paragraph 6 as used in earlier government contracts related solely to sales tax duties, imposts, revenues, excise or other *taxes.* See, *Batavia Mills, Inc.,* v. *U. S.,* 85 Ct. Cls. 447; and *Righter* v. *U. S.,* 85 Ct. Cls. 699. Subsequently the provision was changed by enlarging it to include adjustment charges or other taxes or charges. The Court of Claims construed the identical paragraph in *Telescope Folding Furniture Co.* v. *U. S.,* 90 Ct. Cls. 635, *Consoli-*

dated Aircraft Corp. v. *U. S.*, 90 Ct. Cls. 496, and in *Clemmer Cons. Co.* v. *U. S.*, 108 Ct. Cls. 718. In the latter case (p. 723), that Court stated that the provision applies only "to definite, fixed, and directly applicable legal charges" aside from the question of whether additional charges were imposed by action of Congress.

Certainly the O.P.A. increases on June 7, 1946 became definite, fixed and directly applicable charges. Furthermore the petitioner and the Chairman of the Board of Awards were in complete accord as to the meaning of the provision at the time the contract was entered into. (*Consolidated Aircraft Corp.* v. *U. S.*, 90 Ct. Cls. 496, 499.)

In the absence of the action by the O.P.A., manifestly petitioner would not have been compelled to pay the increased costs of performing his contract. There is no analogy between those costs which were directly applicable upon the production, manufacture or sale of the dairy products, and the *imposition of Social Security taxes on payrolls* as was the situation in the *Consolidated Aircraft Corporation* case.

The charges paid by petitioner were occasioned by authority of Congress subsequent to the contract date, were not taken into consideration by him when his bid was submitted. "It was this increased cost, brought about by the defendant's act, which the parties intended to take care of." (*Telescope Folding Furniture Co.* v. *U. S.*, 90 Ct. Cls. 635, at page 643.)

We shall not attempt to improve upon the following expressions contained in the dissenting opinion below (R. 15):

> "The Court's conclusion is based upon the proposition that the Chairman of the Board of Awards was not shown to have given authority to alter the language of paragraph 6. He did not, of course, alter or purport to alter it. He only stated what it meant. Some one was required to say what the Government

meant by language which it used which did not have a plain meaning. If the Government man with the imposing title, Chairman of the Board of Awards, did not even have authority to tell a milkman what certain words in a contract which he was sitting to award meant, he constituted a trap for the plaintiff and caught him. If his role was to say nothing, because he didn't know enough to talk, he should have been told to keep quiet and not entrap innocent citizens."

Conclusion

The petition for the writ should be allowed. The judgment should be reversed with directions to enter judgment for petitioner.

Respectfully submitted,

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In the Supreme Court of the United States

OCTOBER TERM, 1950

No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES, PETITIONER

v.

THE UNITED STATES

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF CLAIMS

BRIEF FOR THE UNITED STATES IN OPPOSITION

OPINION BELOW

The opinion of the Court of Claims (R. 7–16) is reported at 91 F. Supp. 305.

JURISDICTION

The judgment of the Court of Claims was entered on June 5, 1950 (R. 16). The petition for a writ of certiorari was filed on August 3, 1950. The jurisdiction of this Court is invoked under 28 U. S. C. 1255 (1).

QUESTIONS PRESENTED

1. Whether an OPA order permitting a supplier to increase his prices to a contractor was

an "adjustment charge" or "other * * * charges * * * imposed * * * by the Congress * * * and made applicable directly upon the production, manufacture, or sale" of an article within the meaning of the standard form of public contract then in use, entitling the contractor to an increase over bid prices.

2. Whether the United States was bound by an unauthorized statement by an officer receiving bids that the contract provisions provided for an increase based on adjustments of OPA ceiling prices.

STANDARD CONTRACT PROVISIONS AND STATUTES INVOLVED

Paragraph 6 of the United States Standard Form 33 of Public Contracts (approved March 30, 1936) reads as follows:

> 6. Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid. If any sales tax, processing tax, adjustment charge, or other taxes or charges are imposed or changed by the Congress after the date set for the opening of this bid, and made applicable directly upon the production, manufacture, or sale of the supplies covered by this bid, and are paid by the contractor on the articles or supplies herein contracted for, then the prices named in this bid will be increased or decreased accordingly, and any amount due the contractor as a result of such change

will be charged to the Government and entered on vouchers (or invoices) as separate items.[1]

The pertinent provisions of OPA Supplemental Order 164, dated June 6, 1946 (11 F. R. 6301) and of the Emergency Price Control Act of 1942 (56 Stat. 23, as amended, 50 U. S. C. App. 901, *et seq.*) are set forth in the Appendix, *infra*, pp. 11, 12.

STATEMENT

The petitioner, who had been awarded a contract for the delivery of dairy products to a Veterans' Administration hospital, brought suit in the Court of Claims on September 15, 1948 (R. 1–3) for $3,292.75, representing an increase, over the bid price of the products, which petitioner paid his suppliers who had raised their prices after the issuance of a supplemental OPA regulation permitting sellers of dairy products to increase their prices.

Petitioner was engaged in the wholesale and retail dairy business at Fayette County, Lexington, Kentucky. He submitted a bid to supply milk and other dairy products to a Veterans' Administration hospital for the period of May 15, 1946 through June 30, 1947. The bid was made

[1] This was one of the standard forms approved by the Secretary of Treasury and issued to all government agencies pursuant to 41 C. F. R. 11.3. The functions of standardizing procurement policies and methods were transferred to the Federal Bureau of Supply in the Treasury Department by Executive Order 6166, June 10, 1933.

on United States Standard Form 33 which contained Paragraph 6, *supra* (R. 4). The bids were opened by an official designated as "Chairman of the Board of Awards," who was not the contracting officer, and whose sole authority was to receive the bids and to award the contract to such person as had bid according to the specification (R. 5, 10). Two unsuccessful bidders specified that their prices were to be adjusted in the event OPA raised the ceilings, but petitioner's bid contained no such clause (R. 5). In the course of the opening of the bids, the Chairman indicated his opinion that bid prices could be adjusted to meet OPA orders under the provisions of Paragraph 6 of the standard contract (R. 5).

The contract was awarded to petitioner, and subsequently the contracting officer of the hospital executed the certificate of award. This official had no conversations with petitioner concerning the contract (R. 5–6).

Subsequently, the OPA issued its Supplemental Order No. 164 (R. 6; Appendix, *infra,* p. 11) which permitted sellers of dairy products to increase their prices by designated amounts. Petitioner's suppliers increased their prices accordingly and, having paid his suppliers the increase, petitioner sought the amount of the increase from the hospital authorities. The increases were paid from June 1946 to June 1947. However, on July 24, 1947, the Finance Officer of the hospital no-

tified petitioner that the increases constituted overpayments; and the sum of the increases was deducted from the current amount due petitioner for the month of June 1947, the last month of the contract (R. 6–7). Plaintiff submitted a reclaim voucher, which was rejected by the Comptroller General (R. 7), and suit followed.

Petitioner contended in the Court of Claims: (1) That OPA Supplemental Order 164, permitting sellers to increase the price of certain dairy products, was a charge imposed by Congress and made directly applicable upon the sale of an article within the meaning of Paragraph 6, and (2) that petitioner was entitled to rely upon the statement of the Chairman of the Board of Awards that in his opinion Paragraph 6 permitted an increase based on an adjustment of OPA ceiling prices. The Court of Claims rejected the first contention on the ground that Paragraph 6 referred only to charges in the nature of a tax (R. 9–10). It refused petitioner relief on the second ground for lack of any evidence that the Chairman of the Board of Awards was authorized to alter the meaning of Paragraph 6 (R. 10–13).

DISCUSSION

1. The decision below is free from error and provides a correct guide to the meaning of the term "charge" in Paragraph 6 of Standard Form 33. Since the term "charge" has many

possible meanings, its meaning in a particular contract is determined by the context in which it appears. The first sentence of Paragraph 6 states "Prices bid herein include any Federal tax heretofore imposed by the Congress which is applicable to the material on this bid" and the term "charge" is then used in the phrase "any sales tax, processing tax, adjustment charge, or other taxes or charges * * * imposed * * * by the Congress" (*supra*, p. 2). On its face, Paragraph 6 discloses its specific purpose as a "federal taxes" clause, and therefore the context in which it is used limits its meaning to a charge in the nature of a tax. *United States* v. *Cowden Mfg. Co.*, 312 U. S. 34.

OPA Supplemental Order No. 164 simply permits sellers of certain dairy products to increase their prices above the amount of the prior regulation (Appendix, *infra*, p. 11). A maximum price ceiling is not a price set by Congress for the purchase of an article, but rather a maximum limit upon the price which private sellers may charge their customers. Section 4 (d) of the Emergency Price Control Act of 1942, 50 U. S. C. App. 904 (d). See *Bowles* v. *Willingham*, 321 U. S. 503, 517. Whether the permissive increase is demanded and received in any particular case depends upon the private contracts and other economic circumstances of the parties. The price of dairy products to petitioner was not

increased by the OPA regulation,[2] but by sellers' taking advantage of the permission granted to them by OPA to increase their prices. Therefore an OPA maximum price regulation is not a tax charge, and the adjustment of a maximum price regulation is not an "adjustment charge" within the meaning of Paragraph 6.

It is apparent that petitioner paid the increase in the price of milk, not because an act of Congress required him to do so, but by virtue of a sub-contract with his suppliers. Paragraph 6, however, provides reimbursement only for taxes or charges which are imposed by federal law directly on the contractor, not those passed on by a sub-contractor (*United States* v. *Cowden Mfg. Co.*, 312 U. S. at 36), and only taxes on the price of the contract article, not those on materials (*United States* v. *Cowden Mfg. Co., id.* at 37), or other costs of performance such as social security taxes on employees' wages (*United States* v. *Glenn L. Martin Co.*, 308 U. S. 62).

Petitioner urges that Paragraph 6 entitles him to recover for any increased costs of performance

[2] Petitioner states the question to be: "Was the order of the Office of Price Administration (issued June 7, 1946, *increasing the price of dairy products* * * *) * * * a * * * charge * * * upon the * * * sale of the supplies?" (Pet. 6); but the question properly phrased should read: "Was the order of the Office of Price Administration (issued June 7, 1946, *permitting private sellers of dairy products to increase their prices*) a charge by Congress on the sale of the supplies?" [Italics added.]

"brought about by the defendant's act" (Pet. 8). But this construction wrenches the term "charges" out of context; it is inconsistent with specific decisions on Paragraph 6, *United States* v. *Glenn L. Martin Co., supra; United States* v. *Cowden Mfg. Co., supra;* and it is contrary to the established rule that government contractors may not recover the additional costs of performance "resulting from its public and general acts as a sovereign." *Horowitz* v. *United States,* 267 U. S. 458, 461 (embargo on freight shipments); *Maxwell* v. *United States,* 3 F. 2d 906 (C. A. 4) (wartime production measures); *New England Tree Expert Co.* v. *United States,* 69 F. Supp. 396 (D. R. I.) (minimum 48-hour workweek); *Ross Electric Construction Co.* v. *United States,* 111 C. Cls. 644 (material priorities).

2. Petitioner cannot rely upon the statement of the Chairman of the Board of Awards to the effect that Paragraph 6 included permissive price increases resulting from an adjustment of an OPA maximum price regulation. The Chairman of the Board of Awards neither had nor represented that he had authority to alter the meaning of any clause in the contract (R. 5).[3] The rule

[3] Petitioner relies (Pet. 8) upon the argument of the dissenting opinion below (R. 15) that the Chairman merely interpreted the meaning of Paragraph 6; but whether his statement is called an alteration or an interpretation is beside the point that Paragraph 6 has a standard meaning which cannot be enlarged upon in a particular case except by an authorized agent.

is clearly established that the United States is not bound to an express or implied contract by any unauthorized action of a government official. *Baltimore & Ohio R. R.* v. *United States,* 261 U. S. 592, 597; *United States* v. *North American Co.,* 253 U. S. 330, 333; *Whiteside* v. *United States,* 93 U. S. 247, 256–257; *Filor* v. *United States,* 9 Wall. 45.

3. None of the questions in this case is important enough to warrant review by this Court. Paragraph 6 of Standard Form 33 is no longer in current use; it has been superseded by Paragraph 10 of Standard Form 32 issued by the General Services Administration on April 18, 1950.[4] In the new form, the tax paragraph has been rewritten to eliminate any use of the term "charges" or any key terms except taxes, tax refunds and drawbacks. There are no other cases pending involving the meaning of "charges" as used in the now superseded Paragraph 6 of discarded Form 33, and it appears that none is likely to arise.

[4] This form becomes mandatory on all government agencies effective October 1, 1950. See 1 CCH *Government Contracts*, Para. 18305; Federal Supply Service Circular No. 13, dated April 18, 1950.

CONCLUSION

The decision is clearly correct. The questions in the case are of no substantial importance, and the petition for a writ of certiorari should therefore be denied.

Respectfully submitted.

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SEPTEMBER 1950.

APPENDIX

1. OPA Supplemental Order 164, dated June 6, 1946 (11 F. R. 6301), reads in pertinent part as follows:

* * * * *

SECTION 1. *Purpose of this order.* This order permits increases in the sellers' maximum prices for "fluid milk," "cream" and "half-and-half" sold at wholesale and retail to compensate such sellers for the increases in maximum prices payable to producers permitted by Amendment No. 21 to Maximum Price Regulation 329 issued simultaneously herewith.

* * * * *

SEC. 6. *Permitted increases in the maximum prices of "fluid milk."* (a) Any seller of "fluid milk" in the areas defined in section 5 (a) above may increase his maximum prices for such "fluid milk" in effect immediately prior to the issuance of this supplementary order by the following amounts:

(1) For "whole milk," one cent per quart and proportionate amounts for other size containers.

(2) For "fluid milk products" one-half cent per quart and proportionate amounts for other size containers.

SEC. 7. *Permitted increases in the maximum price of "cream" and "half-and-half."* (a) Any seller of cream and half-and-half in all areas designated in paragraph (a) and paragraph (c) through (i) of section 5 above may increase his

maximum prices for such "cream" and "half-and-half" in effect immediately prior to the issuance of this supplementary order by the following amount:

(1) For "cream" one cent per half pint and proportionate amounts for other size containers.

(2) For "half-and-half" one-half cent per half-pint and proportionate amounts for other size containers.

* * * * *

2. Section 2 (a) of the Emergency Price Control Act of 1942, 56 Stat. 23, as amended, 50 U. S. C. App. 902, reads in pertinent part as follows:

> (a) Whenever in the judgment of the Price Administrator (provided for in section 201) the price or prices of a commodity or commodities have risen or threaten to rise to an extent or in a manner inconsistent with the purposes of this Act, he may by regulation or order establish such maximum price or maximum prices as in his judgment will be generally fair and equitable and will effectuate the purposes of this Act. So far as practicable, in establishing any maximum price, the Administrator shall ascertain and give due consideration to the prices prevailing between October 1 and October 15, 1941 (or if, in the case of any commodity, there are no prevailing prices between such dates, or the prevailing prices between such dates are not generally representative because of abnormal or seasonal market conditions or other cause, then to the prices prevailing during the nearest two-week period in which, in the judgment of the Administrator, the prices for such commodity are

generally representative), for the commodity or commodities included under such regulation or order, and shall make adjustments for such relevant factors as he may determine and deem to be of general applicability, * * *.

U. S. GOVERNMENT PRINTING OFFICE: 1950

PETITION

FOR

REHEARING

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SUPREME COURT OF THE UNITED STATES
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No. 234

CHARLES W. KELLY, TRADING AND DOING BUSINESS AS KELLY DAIRIES,

Petitioner,

v.

THE UNITED STATES,

Respondent.

PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

To the Chief Justice of the United States and the Associate Justices of the Supreme Court:

Statement

This petition for rehearing is filed pursuant to order of the Court entered October 30, 1950 extending the time within which to file it to November 16, 1950.

Certificate of Counsel for Petitioner

Counsel for petitioner hereby certify, pursuant to paragraph 2 of Rule 33 of this Court, that the petition for rehearing is presented in good faith, not for delay, and is restricted to the following grounds enumerated in said Rule.

Grounds for Rehearing

1. Intervening circumstances of substantial effect: Counsel for petitioner were not apprised until filing of Respondent's Brief that the very paragraph of Petitioner's contract and the subject of the controversy, has been superseded and became effective on all Government agencies October 1, 1950. (Respondent's Brief, page 9).

2. Substantial grounds available to petitioner although not previously presented: Petitioner should be afforded opportunity to present the answer to the Government's assertion (Repondent's Brief, page 7) that the increased "charge" in the contract was caused by petitioner's subcontractors and not by action of the Congress as recited in Paragraph 6 of the contract.

Respectfully submitted,

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ON PETITION FOR REHEARING OF ORDER DENYING PETITION FOR WRIT OF CERTIORARI.

BRIEF OF PETITIONER IN SUPPORT OF PETITION FOR REHEARING

Argument

I.

It is now self-evident that at last the General Accounting Office and all government contracting officers have eliminated from a standard form government contract a provision which for years has misled and occasioned loss to innocent citizens. As rewritten, effective on all government agencies October 1, 1950, the term "charges" is eliminated. (Respondent's Brief, page 9). Thus the

Government in effect gives notice albeit belatedly that although petitioner relied upon the term (the dissenting Judge of the Court below described the situation as entrapment; R. 15; Brief in Support of Petition for Certiorari, pages 8, 9), government contractors will not continue to be misled *after October, 1950.* This, of course, is no comfort to petitioner.

Elimination of the term "charges" confirms precisely the position asserted in Petitioner's Brief in Support of Petition for Writ of Certiorari. Moreover, it is utterly inconsistent with Respondent's argument (Brief, page 8) that petitioner's construction of Paragraph 6 "wrenches the term 'charges' out of context; * * *". Otherwise, what purpose is now served by eliminating the term? The statement in Respondent's Brief (page 9) that there are no other cases pending involving the meaning of the term and that it appears none is likely to arise, is not the answer nor is it persuasive. It must be regarded as speculative because unquestionably many government contracts not yet entirely performed contain the old Paragraph 6. Certainly it cannot be predicted safely that litigation will not arise in the Court of Claims during the six-year period within which suit may be brought. The fact that no *cases* may be pending at this time is no guarantee that none will be instituted before expiration of the statutory period. This uncertainty only emphasizes the reasons for allowance of the writ of certiorari. (Brief for Petitioner, page 4). The conclusion is inescapable that abandonment of the old Paragraph 6 was due to realization it is misleading and imposes injustice and hardship upon those citizens who contract with their government.

II.

Respondent contends (Brief, page 7) that petitioner paid the increase in the price of milk because of his subcontract with suppliers, and not because of an Act of

Congress. The contention is fallacious. Petitioner was obligated to deliver dairy products to a government hospital under his contract. If he had not paid the increased prices to his suppliers authorized by the O. P. A. order issued under an Act of Congress, performance of the contract by delivering those products would have been impossible. Furthermore, petitioner actually received monthly payments during performance for such price increases only to find that upon complete performance the total of those increases were deducted from his final payment voucher.

Conclusion

The construction to be placed upon the controversial paragraph in government contracts should be settled definitely. Unless its meaning is determined finally by this Court, there is no assurance that the problem will not arise even under pending uncompleted government contracts containing the same provision. The conflicting views of the Court below should be resolved. The petition for writ of certiorari should be allowed and the judgment reversed with directions to enter judgment for petitioner.

Respectfully submitted,

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